

March 2, 2012

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

**Re: Notice of Oral Ex Parte Communications and
Submission of Supplemental Information
MM Docket No. 99-25, MB Docket No. 07-172**

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's Rules, this notice is given of two ex parte conversations in the above-referenced proceeding. On February 29, 2012, the undersigned counsel had a telephonic conversation with Erin McGrath, Acting Legal Advisor, Media to Commissioner McDowell, about matters in the above-referenced proceeding. A follow-up voicemail was left on March 1. On March 1, 2012, the undersigned counsel had a conversation with Dave Grimaldi, Chief of Staff to Commissioner Clyburn, also about matters in this docket.

In both conversations, the undersigned emphasized that his client, Educational Media Foundation ("EMF"), remained very concerned about any proposed limit on the number of applications remaining from the 2003 FM translator window that any one applicant can process once the Commission makes its determination in the above-referenced proceeding as to the priorities between LPFM and FM translator availability. EMF filed the legal challenge to the original application cap, and remains opposed to such retroactive limits on already-filed translator applications. EMF reiterated that any cap on application processing will harm rural residents, as applications that are pending for rural areas are more likely to be dismissed so that those applications serving greater populations can be prosecuted.

As set forth in more detail below, in these conversations, counsel made clear that EMF opposed all limits on translator application processing after the FCC protects LPFM opportunities. However, if such limits are adopted, they should be applied only in "spectrum-limited markets," not in rural areas where there is no lack of FM channel availability for LPFM or translators. Moreover, any cap should be one on granted construction permits to be received by an applicant, not on applications that can be processed by an applicant.

EMF noted that, if the cap is imposed on “applications that can be processed” rather than “grants that can be received” by a single party, the number of new translator stations that any applicant will ultimately receive will be far fewer than the number of applications that are selected for continued processing, as almost all pending applications are mutually exclusive with other applications.

Any limit further penalizes applicants who have a number of applications that remain pending, with no public interest reason for doing so. These applicants filed their applications in good faith, in reliance on the rules that were in place when they filed. Parties like EMF, who are committed to building as many of the construction permits for new stations as conditions permit, would be penalized by such a cap which appears to be aimed only at a few applicants who may have filed for purposes that the Commission now deems abusive. Adopting a rule that penalizes innocent parties for abuses that may or may not have been committed by other applicants does not serve the public interest, nor does it comport with the requirements of the Local Community Radio Act which says nothing about any widespread dismissal of FM translator applications, especially where such applications do not impede the availability of LPFM service.

As part of any settlement process once the FCC opens a settlement window among the remaining translator applicants, parties will do an evaluation of which applications are pending, and look at reaching agreements where one party may give up certain applications to allow another party to receive a grant, in exchange for that other party doing the same in connection with applications that the first party may value. In that way, parties can work out their differences so that many parties are satisfied by the end result. If there are not applications available to be traded in this kind of process, the result will be more situations where parties have no reason to work out mutually exclusive applications, so that only those willing to wait to participate in an auction where the highest price, not the best interests of the most parties, will determine the application that is to be granted. By not having applications to trade in such a process, settlements may actually be discouraged.

This is particularly true in connection with any cap that would limit an applicant to prosecuting a limited number of *applications* in a single market. In many cases, there are applicants who filed multiple applications in a single market in hopes of getting at least one grant in that market. If all applicants are limited to prosecuting just one application per market, it is possible that all could choose to pick the one or two best frequencies in that market to pursue, leaving many mutually exclusive applications for those particular frequencies. If any limit adopted by the Commission were instead based on construction permits received by a party, not applications to be processed, the parties could maximize the use of the frequencies in the market by “trading” among themselves to see who would get which frequency. Many parties could end up with frequencies at the end of the day rather than fighting over limited channels.

It is important to remember that none of these proposals will have an adverse impact on LPFM availability, as none of these translator applications will be processed until a LPFM

service floor has been guaranteed in a market, under the process proposed by the Media Bureau in the July NPRM. For these reasons, EMF's counsel stated that while it opposes any limits on applications that can be processed, EMF believes that a limit on grants of construction permits to a party, rather than limiting the number of applications that can be processed, is a preferable option.

As stated in the discussions, EMF has many applications pending in small markets, where there has been absolutely no claim of the lack of spectrum for LPFM users. Following the discussions reported in this letter, EMF has studied the details of the effect of a 50 application cap on its pending applications. The effect of limiting an applicant to 50 applications will likely be the dismissal of the applications in the smallest markets for which EMF has applied. EMF has approximately 490 translator applications that remain pending. It appears that about half (or perhaps a bit more) would be in Top 150 markets. A number of those applications will be subject to dismissal by the FCC to preserve LPFM availability. However, based on the preliminary analysis of where applications will be processed, and where they will be dismissed as set out in the July 2011 Notice of Proposed Rulemaking, it is expected that over 50 EMF applications will remain in those markets.

In these Top 150 markets, where the July NPRM identified the most spectrum congestion, the average population served by each of EMF's pending applications is about 138,000 persons. In the 50 smallest service areas for which EMF has applied, the average population served by each application is less than 5,000 people. In the 100 smallest service areas for which EMF has applied, the average population served by each application is just over 15,000 people. Even the 200 applications serving the smallest areas by population only average about 38,000 people. The 250 EMF applications serving the smallest population cumulatively serve just 12.8% of all the people proposed to be served by the 490 pending EMF applications. By contrast, the 150 applications serving the largest areas serve approximately 73% of the total population proposed to be served by all of EMF's pending applications. Thus, if an application cap were imposed, it is quite clear that EMF would choose to prosecute the applications in the larger markets, where the most people would be served by any granted application (almost ten times the population served by each application than in the smallest 100 markets), not the smaller areas where far fewer people would get the benefit of new EMF service.

In conversations with Mr. Grimaldi, he asked what kind of communities would be some of the rural areas where EMF's applications would likely be dismissed if an application limit that applied to all markets was imposed. The 20 communities with the smallest populations covered by the proposed EMF translators are set forth below. These represent the kinds of small communities where EMF would likely abandon applications if forced to limit its selection to some arbitrary number of applications. As the timing of future translator windows is uncertain, as is any limitations on the number of applications that will be able to be filed in such a window, it may be years (if ever) before these communities, and ones like them, get the kind of service for which EMF has applied.

Petersburg	TX
Kellerman	AL
Punkin Center	TX
San Leon	TX
Santa Maria	CA
Cheney	WA
Franklin	IN
Colton	WA
Stillwell	OK
Houston	IN
Hollister	CA
Krotz Springs	LA
Lawrence Mountain	TN
Lynville	TN
Downer	MN
Livonia	LA
Port Allen	LA
Dayton	TX
Cooperstown	NY
Stillwater	OK
Fouke	AR
Brockwood	AL
Jarrell	TX
Turrell	AR
Sheridan	IL
Altadena	CA
Pearblossom	CA
Paoli	IN
Warsaw	NC
Ellsworth	ME
Valley City	ND
Basic	MS
Iron Gates	MO
Frazier Park	CA
Bedford	IN
Williamston	MI
Grandview	TX
Lebanon	TN
Mitchell	IN
Vivian	LA
Oakhurst	CA
Ida	MI

Marlene H. Dortch, Secretary
March 2, 2012
Page 5

Yreka	CA
Holly	MI
Northport	AL
Adel	IA
Elma	WA
Chehalis	WA
Genesse	ID
Angels Camp	CA

Given the passage of 9 years since these applications were filed, EMF cannot guarantee that it is still possible to build the translators in each of these communities. But it is ready to do as it has done with the translator construction permits that it has already received from the 2003 window - build as many as possible so as to provide its family friendly programming to as many people as possible in both urban **and rural** markets. Thus, EMF submitted in both conversations, that any processing cap that is adopted should apply only in "spectrum limited markets" (i.e. ones where a significant LPFM adverse impact is likely), not in rural markets like the many for which EMF has applied.

In a subsequent email to both Ms. McGrath and Mr. Grimaldi, the undersigned counsel also pointed out that, by limiting the number of applications that can be processed from the 2003 window, the Commission may also be limiting the number of auctions that will ultimately be held after any settlement window. This will limit the amount of revenue to be received from these auctions, to the detriment of the public.

A copy of this notice is being filed in the relevant docket. Should there be any questions concerning this matter, please contact the undersigned.

Sincerely,


David Oxenford

cc: Erin McGrath, Esq.
Dave Grimaldi, Esq.
Jessica Almond, Esq.